

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Assessment and Collection of Regulatory Fees)	MD Docket No. 13-140
for Fiscal Year 2013)	
)	
Procedures for Assessment and Collection of)	MD Docket No. 12-201
Regulatory Fees)	
)	
Assessment and Collection of Regulatory Fees)	MD Docket No. 08-65
for)	
Fiscal Year 2008)	

COMMENTS OF FIREWEED COMMUNICATIONS LLC AND JEREMY LANSMAN

Fireweed Communications LLC (FWTV) is an FCC regulatee¹ (User), broadcasting as KYES-TV to South Central Alaska. It is a member managed LLC. FWTV has two broadcast operations. One is KYES-TV, which main channel is a My Network television affiliate. The other is KNIK-LP which operates as an FM station, under LMA to a local radio broadcasting company. FWTV and its members have no other broadcast interests.

Under SBA rules, FWTV combined with revenue of its members qualifies as a small business².

1 Since some regulatees of the Commission may not be licensed, but are authorized to conduct regulated activities, it is more accurate to use the term user.

2 The Small Business Administration sets the upper revenue limit for small television broadcasters at \$35.5 million. Fireweed's revenue is far less. <http://www.sba.gov/content/table-small-business-size-standards>

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Introduction:

Under 47 U.S.C. § 159(b)(1)(A), each year the Commission is faced with a daunting task. It must calculate the cost of administering different divisions of the commission, and find a way to estimate how much to charge those benefiting from that work to recover the cost. The law mentions three divisions by name, “...the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau...” Several categories of licensees, such as non-profits, are exempted thus passing higher costs onto others. Although the Commission is authorized to adopt “permitted amendments,” and directed that, in so doing, it “shall add, delete, or reclassify services in the Schedule” in light of additions, deletions or changes in the nature of services or in law. Such modifications have been few, and, in spite of communications technology convergence, have not kept pace, nor have changes been made in order to enhance administrative efficiency.

Herein we suggest the Commission can reduce its workload, and enhance fairness, by reducing the number of categories and changing fee calculations to a percentage of gross revenue³. The Commission has incomplete revenue information, as many fee payers are not presently obligated to report revenue. However, reporting a single revenue number for the most recent company fiscal year is simple, taking little time or effort. It could be typed into a web form in a few seconds.

Commission fee rules create more Commission work than required under law. Resulting fees are arbitrary and capricious, leading to unfair apportionment of fees among various users. Fees when

3 As suggested in the GAO report made part of this docketed proceeding. “However, CRTC has one broadcast fee category that includes radio stations, television stations, and cable and direct broadcast satellite television operators. All pay the same rate on the same basis—the licensee’s fee revenues for the most recently completed year. ” August 2012 United States Government Accountability Office, Report to Congressional Requesters, FEDERAL COMMUNICATIONS COMMISSION , Regulatory Fee Process Needs to Be Updated , Page 32

applied to broadcasters are taxes.^{4 5} Unfairly apportioned arbitrary and capricious taxes are unconstitutional.

Categories Should be Reduced or Altogether Eliminated:

In Paragraph 33, the Commission asks,

In addition to using revenues to calculate regulatory fees for the wireless industry, discussed above, we invite comment on whether revenues would be a more appropriate measure for *other industries* in FY 2014 or future years.

Today, telecommunications is entirely⁶ about transport of bytes between one place and another.

Connections are digital. In 1995, Nicholas Negroponte, seeing the future, predicted the changes we are experiencing. His first chapter of *Being Digital*⁷, is entitled Bits are Bits. Negroponte wrote:

In analog days, the spectrum allocation part of the FCC's (Federal Communications Commission) job was much easier. It could point to different parts of the spectrum and say: this is TV, that is radio, this is cellular telephony etc. But in a digital world, these differences blur or, in some case, vanish: they are all bits. In the near future, broadcasters will assign bits to a particular medium (TV or radio) at the point of transmission. This is usually what people mean when they talk about digital convergence or bit radiation. The transmitter tells the receiver, here come TV bits, here comes radio, or here come bits that represent the Wall Street Journal. *In the more distant future the bits will not be confined to any specific medium when they leave the transmitter.* [emphasis added]

Bits are bits, no bit different from another. Bits will carry anything digital. Music, office documents, voice, broadcast television. What makes the circuit a "cellular call" or a "Direct to home satellite" is the user terminal equipment⁸.

Because all telecom has changed to bit transport⁹, it is time to consolidate regulatory branches, for

4 "...charges for activities that confer a public benefit, such as regulation of radio and television broadcasting, are taxes." Chapter Three, User Charges, the Congress, and the Courts, The Growth of Federal User Charges., Pearl Richardson; United States. Congressional Budget Office, [1993]

5 "If the ultimate use of the revenue benefits the general public, then the charge will be considered a tax; the charge will more likely be considered a fee if the revenue's benefits are narrowly circumscribed." San Juan Cellular, 967 F.2d at 685

6 There are a very few examples of legacy analog telecom. The most common would be the last mile, in copper, from a telephone switching center to a land line subscriber.

7 January 1995 by Alfred A. Knopf

8 All digital connections are one way, but some, such as internet, require a parallel return path. Broadcast authorizations do not include a return path, but nothing stands in the way of using cellular, internet, or other means to send data back to the broadcasters point of origin.

9 Most copper telephone, aeronautical voice, some private and public land mobile radio systems, and most AM and FM sound broadcasting remain analog.

regulatory fee purposes, as well as other purposes, because the retention of legacy labels in fees retains unfairness, magnified with each biennial patch-up, while in other areas it promotes undesirable outcomes and prevents needed governmental oversight¹⁰. Conflating User categories would reduce FCC workload, but more importantly, would reduce category cross subsidization. As we point out below, Media Bureau Users are subsidizing Wireless Users. Wireless systems will soon be broadcasting television programs via Long Term Evolution (LTE) on TV channels. As media continues to converge, the injustice of cross subsidization from broadcasters to mobile phone broadcasters will become more apparent.¹¹ As a practical matter, the Commission has imposed an unexplained, unjustified tax^{12 13} that is especially burdensome on small independent broadcasters, broadcasters who might have a different political viewpoints from those of larger multiple station group owners.¹⁴ Consolidation of fee categories would improve efficiency and fairness.

Fees Should be Revenue Based, With a Media Bureau Discount:

Fees levied on Media Bureau Users are not fairly apportioned. Changing the basis of the fees to a percentage of revenue alone would help, but still leave broadcasters at a disadvantage. We noted that mobile phone operators who have adopted a new protocol called eMBMS¹⁵ are now becoming

10 Fireweed and Lansman filed a Petition to Deny and Reply to Opposition in the General Communications Inc. (GCI) – Alaska Communications System (ACS) – Alaska Wireless Network, KTVA-(TV), KATH-LP, KCST-LP merger. See Docket 12-187 and look under CDBS – KTVA for the transfer application and the PTD. Petitions were filed with both media and wireless branches. Therein Fireweed set forth arguments that the two branches should consolidate.

11 Radio, both AM and FM are still largely analog. Although digital standards for both media have been set, in the USA, unlike the UK and Europe, digital receivers are uncommon.

12 Regulatory fees are deposited to the treasury. The fee may be intended to offset operation of the Commission, but fees do not go to the Commission. In every year Users have paid in more than the Commission's budget, yet have not received refunds. It may be called a fee, but it is not. It is a tax.

13 Ibid

14 *Minneapolis Star v. Minnesota Commissioner of Rev.*, 460 U.S. 575 (1983), 460 U.S. 575 “That threat can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. Moreover, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression.”

15 Note that eMBMS allows for nation wide broadcast. There are no rules prohibiting mobile phone operators from purchasing exclusive rights to television sports and inserting commercials. http://s3.amazonaws.com/sdieee/222-eMBMS_tech_overview_IEEE_112712.pdf Verizon has announced it will be in the broadcast business. See <http://www.fiercebroadbandwireless.com/story/verizon-exec-2014-definite-launch-lte-broadcast-service/2013-03-17>

broadcasters. The new protocol allows mobile operators to send a synchronized broadcast signal from multiple towers. It might be thought that fees for mobile and media Users should be the same. That thinking would be wrong. Broadcasters have public interest obligations, which mobile phone operators do not. Broadcasters get less private benefit transmitting on a television channel than cell phone operators will when they send out the exact same material on the same channel.¹⁶ That broadcasters have additional obligations and are not “beneficiaries” is explained in the OMB publication noted in FN 2.

The law, in section (B) (1) (A) states fees shall be, “.. adjusted to take into account factors that are reasonably related to the *benefits provided to the payor of the fee* by the Commission’s activities...” When a Fireweed station broadcasts television, it must adhere to multiple public interest rules – Children's Programming, Children's Advertising Limits, political lowest unit charge, and many others. Mobile phone operators do not. In other words, Media Users get less benefit. The law would clearly indicate that Fireweed's fees should be reduced accordingly.

Let us define revenue as all cash money received as a result of operations conducted pursuant to an activity permitted under an FCC authorization. Let's say the Commission's goal is to raise \$333,844,000, the 2011 goal. Assume total telecommunications revenue is \$ 750 billion¹⁷. To reach the Commissions goal, fee payors would need to pay 0.000445125 of revenue, or less than one twentieth of one per cent (.0445125%). Once payor revenue is known, setting fees would be fair¹⁸, easy, predictable, and automatic. A slightly higher overall rate also would make it possible to categorically exempt very small fees, for example auxiliary services that are currently charged at \$10 or \$20 per unit. These fees are nowhere near worth their cost to regulatees to report and pay them, nor the cost of the government to oversee them and pursue parties who miss a tiny payment.

16 Rules applicable to broadcasters but not mobile phone operators include but are not limited to § 73.3613 Filing of contracts, 73.3612, Annual employment report, § 73.3615 Ownership reports. § 73.4050 Children's TV programs. § 73.4185 Political broadcasting and telecasting, the law of. § 73.1942 Candidate rates.

17 http://www.researchandmarkets.com/research/5c9efa/us_telecom_industr

18 Or not fair, the public interest obligations of Broadcasters is properly accounted for.

Fee Waivers and the Administrative Procedure Act:

The statute, and FCC rules provide for fee waivers , ...”where such action would promote the public interest.” However, it is clear, looking at fee decisions issued to Fireweed, and a few other such decisions that have been reported publicly by the Commission, that the OMD has not been transparent, has created rules without allowing public comment, has not published the rules, and has hidden decisions from public view.¹⁹ We respectfully request the Commission publish redacted financial data from fee decisions and publish them, and subject what has been hidden policy to the sunshine of public accountability.

Looking at Fireweed as Example

In 2012 Fireweed had a total recorded gross income of \$ 461,814.92 . Of that, \$166,478.00 was payment on an insurance claim resulting from the main transmitter having been damaged beyond repair. Thus, gross income for Fireweed was \$295,336,92. That multiplied by our proposed omnibus standard fee formula of .0445125 results in a fee of **\$131.46** rather than present fees in excess of \$5,000. The lower the fee, the lower the probability Fireweed would take the time to seek a waiver, resulting in less staff work in administration as well as greater fairness. On the other hand, if the fee exceeds Fireweed's capability to pay, the result could be a loss of service to the public.²⁰

Also, we would note that had Fireweed the capability to pay the fee, and had done so, it would be subsidizing AT&T and Verizon

19 Hidden away at the FCC web site we can find this, <http://www.fcc.gov/document/fee-decisions-managing-director-available-public-16> via Google. You can look for a waiver granted. In vain. The decision letters are not available to the public.

20 The Commission's “red light” system barring applications by regulatees who owe fees often operates against the public interest. Applications to assign a license from a struggling operator to one who can preserve or even improve it can become stalled. Applications to improve technical service also can stall. And approvals that should be routine often are delayed because of poor record keeping or mismatches between operational files and red light files.

VHF UHF Disparity:

This Notice proposes that for 2013 the fees shall continue to be much higher for VHF than UHF TV stations. A perverse result is that KYES-TV will be asked to pay more than its UHF CBS and FOX competitors, a condition that immediate change to revenue based fees would correct. The Commission has recognized, for more than two years and through at least one previous biennial fee adoption cycle, that with the advent of DTV, stations in the UHF band have become far more valuable than stations in comparable VHF channels. Indeed, the Commission has adopted a withering critique of the weaknesses besetting VHF.²¹ The even more extreme disadvantage of low-band VHF is duly noted there. The enabling legislation for regulatory fees purports to exempt the fee setting from judicial review, 47 USC Sec. 159(a)(3). However, the treatment of this VHF – UHF disparity is so stark that it represents a taking of a valuable interest without due process of law in violation of the Fourth Amendment to the U.S. Constitution. The statute should not insulate Commission actions that are so extreme and so at odds with the Agency's own fact finding.

The FCC Catch 22 Fireweed Ruling

The Catch 22 Fireweed Ruling²² should be reversed and waiver²³ requests for past years accepted Nunc Pro Tunc, or In the Alternative The Commission Should Grant Fireweed Permanent Waiver Pursuant to 74 USC 307(f):

The Commission has issued a ruling that in the event Fireweed might qualify for a fee waiver²⁴, the waiver request must be supported by documents, IRS income tax returns that do not exist. If Fireweed waits until the returns are filed, it will miss FCC fee deadline. Catch 22, exactly. If other

21 Innovation in the Broadcast Television Bands, Notice of Proposed Rule Making, FCC 10-196, Rel. on November 30, 2010, see paras. 42-49.

22 “A catch-22 is a paradoxical situation in which an individual cannot or is incapable of avoiding a problem because of contradictory constraints or rules. Often these situations are such that solving one part of a problem only creates another problem, which ultimately leads back to the original problem. Catch-22s often result from rules, regulations, or procedures that an individual is subject to but has no control over.”
http://en.wikipedia.org/wiki/Catch-22_%28logic%29

23 The Commission embodied its interpretation of 47 USC § 159 (d) 47 USC § 159 (d) at § 1.1166. The Commission notes in its letter to Fireweed several factors to be considered, none of which have been subject to rulemaking proceedings, in contravention to the Administrative Procedures Act.

24 47 USC § 159 (d) 47 USC § 159 (d) “Waiver, reduction, and deferment The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest. “

Users have been issued a similar ruling, this section of our comments should apply to them as well.

Fireweed has two members, as is documented in its ownership report²⁵. Carol E. Schatz, and Jeremy Lansman. The writer of this comment is Jeremy Lansman. In a letter from OMD, Fireweed's request for waiver of regulatory fees was declined by June 6 2011, stating:

As such, the profits and losses pass through the business entity to the members, and because of that treatment, it is difficult to define a bright line between the business entity's financial records (e.g., partnership, sole proprietorship, or Subchapter S corporation) and personal financial records. Hence, our requirement that the regulatee "fully document" its financial position extends to the limited liability company member's gross income, assets, liabilities, and cash flows. Because you did not provide those financial records, and clarify your position, you did not fully document each Station's financial capability to pay the regulatory fee and maintain service to the public.

IRS filings are due April 15th for the preceding year. FCC filings are due approximately September 13²⁶ or so, for the preceding fiscal year. In this instance, the final LLC and individual income tax returns were filed well after the FCC deadline, pursuant to an IRS extension request.

Also, implied in the decision, is a requirement that if an LLC member has other, non broadcast income, it may be a condition of licensing that the members contribute non broadcast income to the Federal treasury.

Fee Decisions In Conflict With Commission Rules and Policy.

Last fall a once in a lifetime storm, not unlike hurricane Sandy, damaged KYES-TV's transmitter beyond repair. Having filed for an STA, the station connected a driver amplifier to the transmitting antenna resulting in approximately 10% of nominal power for the VHF signal, bringing reception back to some of the service area and most of its population. Is it in the public interest to continue to

25 See FCC form 323, BOA 20111109ABO and preceding filings.

26 Payment of FY 2012 regulatory fees. Regulatory fee payments must be RECEIVED by the Commission no later than 11:59 PM, ET, on September 13, 2012, <http://www.fcc.gov/document/payment-and-procedures-public-notice-fy-2012-regulatory-fees>

serve the public²⁷? Fireweed is in Red Light status, meaning its applications, including the STA was not processed. Funds to pay overdue fees were not in KYES's bank account. So, KYES is left unable to operate in accord with FCC rules. In another example, Its most important transmitter, that of translator station K22HN-D, is in a residence used by Fireweed's members. More people in the urban area use that signal than any other. When the home is sold, K22HN-D must move. An application for that move has been pending since June 21, 2012²⁸. When the time comes to move, for KYES channel 22 viewers, the station will go dark, or the station must operate from a location where it is not authorized to operate. Considering its public interest responsibilities, which is more responsible? Go dark, or move without authority to do so? Ultimately, Fireweed DOES have authority under 47 CFR 301 (f) to move without FCC authorization. But that is not a satisfying solution for the Commission or Fireweed.

Fireweed cannot be the only LLC so ill treated. For all such organizations, The Commission should, by rule, direct OMB staff to notify all Users, that it will consider reversing fees and penalties if so requested by the User, and open a new window for filing nunc pro tunc for new waivers for past years.

47 U.S.C 307 (f):

Fireweed has claimed it qualifies for statutory protection under 47 U.S.C. 307 (f). Any broadcaster that is able to substantiate such protection should be acknowledged, under FCC rule, as having done so. If any penalties have been levied against such broadcaster, they should be reversed.

27 KYES-TV and its translators have four program services. One is NCE, provided by the University of Washington. Another is a full time news channel out of Paris France (in English). When the transmitter drops, the station gets a lot of complaints. Fireweed receives no compensation for transmission of these channels.

28 BPD TT 20120621AAH,

Summary:

The Government Accountability Office (GAO) has issued a study of the Commission's Regulatory fee system, finding it flawed. An earlier OMB circular points out that fees for broadcasters are taxes, while fees paid by others are merely fees. Fireweed suggests that inequitable taxation of broadcasters may be unconstitutional; that charging in accord with revenue would help rectify much of the inequity. A result would be fewer requests for Waivers of the fee. Fireweed asks the Commission to retroactively allow nunc pro tunc adjustments resulting from punitive responses to waivers made by itself and possible other similarly situated LLCs.

Jeremy Lansman states under penalty of perjury that statements of fact included within this document are true and correct to the best of my knowledge and belief.

Signed by Jeremy Lansman
June 19, 2013

APPENDIX A

Here we calculate a revenue based fee based upon a lower total revenues as reported by Accadian networks.

Lets assume the fee were \$0.00375 per revenue dollar (as it is with ITSP), and that the target commission goal is \$339,844,000. To match up²⁹, total Commission User revenue would have to be \$ 90,625,066,666. Lets round that to \$91 billion. In 2012 AT&T alone reported revenues of \$126.4 billion. So, based upon revenue, it is clear that KYES pays far more than AT&T.

If Fireweed were to pay a percentage of revenue, the same, though excessive .00375 mentioned above, how much revenue would it have made to incur its present fees? The VHF fee for 2012 was \$5,825. KYES-TV pays fees for four translators, which are charged \$385 each. Total annual fees if not waived and timely paid would have been \$7,365. If that fee were set to \$0.00345³⁰ % of gross revenue Fireweed would have to have revenue of \$2,134,782.61. According to our Quickbooks report, net cash in to Fireweed during 2012 was only 461,814.92 . Using the vastly inflated \$0.00345% number, we get a fee of \$1,731.81.

Lets drop that inflated FCC take of .00345% and adjust it.³¹ Accadian networks reports:

U.S. wireless revenue in 2012 will be about \$335 billion, while fixed network voice revenue will be about \$132 billion, with an additional \$38 billion in broadband access revenue and \$6 billion in television revenue, for a total of about \$176 billion in fixed network revenue.

So, if the total government take is supposed to be \$339,844,000 out of 176 billion, the correct percentage would be .00193. That would make Fireweed's hypothetical contribution to the US Treasury only \$ 891.73.

29 Commission's goal \$339,874 / .00375 = gets us the required reported revenue to reach the goal.

30 ITSP is charged charged this lowball rate, that is lowball in comparison ot KYES rate.

31 <http://www.accedian.com/blog/news/wireless-contributes-66-telecom-revenue/>

ATTACHMENT C



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